TEOH CHONG POH

v.

MAJLIS PERBANDARAN PULAU PINANG & ORS.

HIGH COURT MALAYA, PULAU PINANG
MOHAMED DZAIDDIN J
[SUMMONS NO. 22-68-92]
30 MARCH 1992

CIVIL PROCEDURE: *Injunction - Ex-parte - Prohibitory injunction - Trespass to land - Is damages adequate remedy - Who committed the trespass - Is there prima facie evidence - Balance of convenience.*

On or about 11 November 1991 the 1st defendant and/or their agents or contractors, the 2nd and 3rd defendants entered the plaintiff's land and demolished two premises. On the same day the plaintiff obtained an *ex-parte* interlocutory injunction against the 1st defendant and/or their agents from trespassing and attempting to demolish the two premises.

On 19 December 1991 by consent of the parties the injunction order was dissolved on an undertaking by the 1st defendant to reconstruct the two premises within 3 months after the completion of the sewage works. However the 1st defendant failed to comply with the condition of the consent order.

Subsequently on 15 February 1992, the 2nd and/or 3rd defendants trespassed on the plaintiff's land and demolished the plaintiff's remaining structures, the pig-sties, fish tanks and outhouses. The workers and agents of the 2nd and 3rd defendants continued to trespass into the said land and started to construct drains as well as excavating the area for the construction of road and bridge.

Held:

[1] Although the plaintiff may have the right to recover damages, yet his right to possession of the said portion cannot be adequately protected or vindicated by damages.

[2] The plaintiff has failed to satisfy that the 1st defendant was directly involved in the commission of the trespass to his portion on 15 February 1992 and thereafter. The plaintiff cannot infer, in the absence of cogent evidence, that the trespass was instigated by 1st defendant in pursuance of the powers under s. 49 of the Street, Drainage & Building Act 1974.

[3] There is *prima facie* evidence that the 2nd and 3rd defendants, their servants or agents had trespassed on the plaintiff's portion by demolishing the remaining structures, pig-sties, fish tanks and outhouses for the purpose of constructing roads, drains and bridges on the said portion. The plaintiff has shown an arguable case against the defendants.

[4] Damages would not adequately compensate the plaintiff the temporary damage he and the family have suffered as a result of the trespass and demolition of the two premises, the pig-sties and fish tanks which are his source of livelihood because of his possessary right to the said portion.

[5] Based on the plaintiff's affidavit, in particular the fact that he and his family had no place to stay and the demolition of the pig-sties and fish tanks had effected his livelihood, the balance of convenience tilts in favour of the plaintiff.

[Injunction against 1st defendant dissolved with costs. Application of 2nd and 3rd defendants dismissed with costs.]

Case referred to:
American Cyanamid v. Ethicon Ltd. [1975] 1 All ER 504 ***(foll)***

Legislation referred to:
National Land Code 1965, s. 136
Street Drainage and Building Act 1974, ss. 27, 49

Other sources referred to:
Halsbury's Laws of England 4th Edn., Vol. 45 para. 1396 & 1404

For the plaintiff - Haji Mohideen Abdul Kader (M. Thayalan with him); M/s. Meena, Thayalan & Partners
For the 1st defendant - Ghazi bin Ishak; M/s. Pressgrave & Matthews
For the 2nd and 3rd defendants - R.R. Sethu (R. Rajasingam with him); M/s. R. Rajasingam & Co.

JUDGMENT

Mohamed Dzaiddin J:

By these summons in lampiran 8 and 11 the 1st, 2nd and 3rd defendants apply to discharge the *ex-parte* interlocutory prohibitory injunction granted against them by me on 2 March 1992, which prohibited them or their servants or agents, until further order, from constructing roads, drains, and/or bridges on a portion of land of Lot No. 6464 Mukim 13 Daerah Timur Laut, Pulau Pinang ("the said portion") on which the plaintiff's premises known as No. 267A and 267H and pig sties and fish ponds were situated.

I made the order based on the plaintiff's affidavit on 2 March 1992, the facts of which are as follows. On or about 11 November 1991 the 1st defendant and/or their agents or contractors, purportedly acting under s. 49 of the Street, Drainage and Building Act 1974 ("the 1974 Act") entered the said portion and demolished the two premises No. 267A and 267H. On the same day, the plaintiff obtained an *ex-parte* interlocutory injunction against the 1st defendant and/or their agents or servants restraining them until further order from trespassing and attempting to demolish the two premises. On 19 December 1991 by consent of the parties the injunction order was dissolved on an undertaking by the 1st defendant to expeditiously reconstruct the two premises within 3 months after the completion of the sewage works which was estimated to last for 2 months. The 1st defendant also agreed to assist the plaintiff to reconnect electricity supply to the remaining structures. Although the sewage works was completed on 31 December 1991, the 1st defendant has not complied with the conditions of the consent order. Be it noted here, there is a pending application of the 1st defendant before this Court to vary the said consent order.

Subsequently, on 15 February 1992, the 2nd and/or 3rd defendant and/or their servants or agents acting on their own and/or as servants or agents of the 1st defendant trespassed on the said portion and demolished the plaintiff's remaining structures, the pig-sties, fish tanks and outhouses. The plaintiff further deposed that some time in late February he was informed by the workers of the 2nd and/or 3rd defendant that they would not reconstruct the two premises which were demolished as the land would be used to construct road, drains and bridge for the Perumahan Farlim project.

Finally, the plaintiff deposed that since one week before he filed the application the workers and agents of the 2nd and 3rd defendants had continued to trespass into the said portion and started to construct drains as well as excavating the area for the construction of road

and bridge. The plaintiff exhibited several photographs showing the demolished portion of the area and construction works being undertaken by the 2nd and 3rd defendants, their servants and agents.

In this application to dissolve the *ex-parte* injunction, the 1st, 2nd and 3rd defendants relied on the supporting affidavits of Encik Lakhbir Singh (lampiran 11) and Encik Ng Bock Tye (lampiran 7). Encik Lakhbir deposed that the 1st defendant was desirous of constructing a trunk sewer from Bandar Baru Air Itam to the Public Sewerage System at Manhole No. W.F.H. 4-04 Jalan Ibbetson, Pulau Pinang. They entered into an agreement dated 9 May 1991 with the 2nd defendant for the latter to construct for the 1st defendant the said trunk sewer upon the terms and conditions mentioned in the said agreement. On 11 November 1991 pursuant to s. 27 of the 1974 Act, the 1st defendant by their agents or servants entered upon Lot No. 6464 on which the Plaintiff's premises No. 267-A and 267-H were situated and demolished them to make way for the construction of the trunk sewer. The plaintiff and other tenants were given temporary accommodation at Lorong Semerak Api Satu. He verily believed the construction works could not be carried out without demolishing the two premises. On the same day, the plaintiff obtained an interim injunction against the 1st defendant restraining the latter from carrying on with trunk sewer construction but was dissolved by a consent order dated 19 December 1991. Encik Lakhbir further deposed that the 1st defendant was informed by the 2nd defendant that the reconstruction of the two premises would be futile because a public road would be constructed passing over the said portion. At any rate, he stated that the said portion had already been vested to the State Government under s. 136 of the NLC. According to him, the 2nd defendant was required to construct this road as a condition for building plan approval for its Bandar Baru Air Itam project, the details of which were approved by the Jabatan Kerja Raya, Pulau Pinang. In view of the above information, the 1st defendant had applied to Court to vary the consent order.

In his affidavit affirmed on 10 March 1992, Encik Ng deposed that the 2nd defendant became the registered lessee of the whole land on 27 August 1983 from the registered owner, Khoo Kongsi. He verily believed that the 2nd defendant acquired its interest free from all adverse claims and their rights are indefeasible. The whole land has been subdivided and individual titles have been issued by the State Authority. As a result of the subdivision, the area occupied by the plaintiff as premises 267A and 267H were surrendered to the State Authorities for roads and drains. The said portion has been vested in the State Authorities. No separate issue document of title has been issued in respect of the said portion. In the circumstances, the 2nd defendant believed that the plaintiff has no claim or interest to the said portion, certainly none against the 2nd and 3rd defendants.

With regard to the plaintiff's claim of having ground tenancy over the said portion, Encik Ng deposed that it was not binding on the 2nd defendant. Moreover, the tenancy has been terminated and frustrated by the subdivision and surrender of the portion of the land for construction of the public road and drains.

As for the construction and laying of sewers, Encik Ng stated the 2nd defendant carried out the work for the benefit of the 1st defendant who exercised its powers under the 1974 Act.

Finally, Encik Ng stated that the *ex-parte* injunction ought to be dissolved on several grounds. These grounds may be summarized as follows:

1. The plaintiff's alleged interest in the said portion does not bind the defendants. As the said portion was vested in the State Authorities the plaintiff could not maintain any action against any defendant. Further, the plaintiff's statement of claim discloses no reasonable cause of action against the 2nd and 3rd defendants.

2. The sewers were laid in the exercise of statutory powers under the 1974 Act. The 1st defendant could not legally reinstate the building and structures. The 2nd defendant's only liability to the 1st defendant is to pay its contribution to any cost incurred by the 1st defendant.

3. The *status quo* and balance of convenience favours the refusal of the injunction. It affects the right of several innocent buyers of the project and any further delay in the completion of the works exposes the 2nd defendant to substantial claim for damages. Hence, severe hardships would be suffered by the 2nd defendant, whereas the plaintiff's claim could be adequately compensated by damages.

4. The plaintiff's affidavit discloses no reasons or justification why the plaintiff had to proceed *ex-parte* to obtain this injunction, which justified the dissolution of the injunction.

The plaintiff in his affidavit affirmed on 21 March 1992 opposing the application maintained that he remains the legal tenant of the said portion having a tenancy coupled with equity which binds Khoo Kongsi and the 2nd defendant. At all material times, the 2nd defendant knows the plaintiff's right to the portion because under an agreement dated 8 April 1983, the 2nd defendant together with the registered owner Khoo Kongsi had negotiated with all the tenants of Thean Teik Estate for compensation.

The plaintiff is unware that the said portion had been vested in the State Authorities. The averments of the 1st defendant and the 2nd defendant in their affidavits were not substantiated by official documents.

On the allegation that there was no justification for the plaintiff to have applied the injunction *ex-parte*, the plaintiff explained that there was great urgency in the matter as the defendants their servants or agents had demolished the remaining structures, pig-sties and fish ponds and were proceeding with the road construction works on the said portion. He personally tried to prevent them but was unsuccessful. Finally, he believed the balance of convenience favours the injunction to remain bacause he and the family were facing hardship as they had no place to live but forced to stay with relatives. Also, his business had been affected by the demolition.

Conclusions:

Based on the above affidavits and after considering the submissions of Counsel, I come to the following conclusions:

1. The plaintiff's application is founded on his substantive claim in the action for trespass to land and for damages, both exemplary and general. The alleged acts of trepass are clearly set out in the statement of claim. His right to sue for trespass is based on his averment that he is and has been at all material times in lawful possession of the said portion and that he and members of the family are the ground tenants having a tenancy coupled with equity. "Trespass is an injury to a possessory right, and therefore the proper plaintiff in an action of trespass to land is the person who was, or who is deemed to have been in possession at the time of the trespass". (*Halsbury's Laws of England* 4th Edn., Vol. 45 para. 1396).

2. In an action for trespass, if the plaintiff proves the trespass, he is entitled to recover damages. "However, the Court may grant an injunction, which may be mandatory, to prevent a continuance or threatened repetition of a trespass and where a trespass is threatened, although not committed, the Court may prevent it by injunction. But, where

a trespass is of a trifling nature, or where damages are a sufficient remedy, or where the granting of an injunction would be oppressive, an injunction may be refused". (*Halsbury's Laws of England* Vol. 45 para. 1404.) In the present action, although the plaintiff may have the right to recover damages, yet his right to possession of the said portion cannot be adequately protected or vindicated by damages.

3. I am satisfied that the plaintiff has shown in his affidavit the need for the said injunction to be made *ex-parte*. There was, indeed, an urgency in the matter because the 2nd and 3rd defendants by their servants and agents were continuing with the construction works and levelling the land for road construction on his portion at the time when he made the application. Moreover, by giving notice and serving the application on the defendants, it would have defeated the purpose of the order. Further the photographs exhibited to the plaintiff's affidavit pointed to the urgency of the *ex-parte* application. These photographs showed construction works and levelling of earth works being carried out by the 2nd and 3rd defendants' workers.

4. There is no proof that the plaintiff's portion has been vested to the State Authority and designated for use as roads and drains. Encik Lakhbir's statement is hearsay and the 2nd and 3rd defendants merely made a bare assertion on this matter.

5. The plaintiff has not omitted to make full disclosure of material facts to support his *ex-parte* application.

6. With regard to the 1st defendant's application, I find the plaintiff has failed to satisfy me that the 1st defendant was directly involved in the commission of the trespass to his portion on 15 February 1992 and thereafater. Nowhere in his affidavit in support of the *ex-parte* application did he specifically depose that the demolition of the structures, pig-sties and fish tanks on 15 February 1992 was carried out by the 1st defendant or on their instructions. Paragraph 12 of the said affidavit merely alleged that the 2nd and 3rd defendants and/or their servants or agents, acting on their own or as agent of Majlis Perbandaran Pulau Pinang trespassed on his portion. It must be borne in mind the crux of the plaintiff's complaint upon which the *ex-parte* injunction was granted was against the demolition of the remaining structures which occurred on and after 15 February 1992. There is clear admission that this was carried out by the 2nd defendant's agent, the 3rd defendant and/or their servants or agents for the benefit of the 2nd defendant's housing project, whereby the said portion would be used for the construction of road, drains and bridges for the said housing project as required under the building plans approved by the 1st defendant and the Jabatan Kerja Raya, Pulau Pinang. In my view, the plaintiff cannot infer, in the absence of cogent evidence, that the above trespass was instigated by the 1st defendant in pursuance of the powers under s. 49 of the 1974 Act. It is not proper, indeed wrong, for the plaintiff to link the commission of the second trespass with the earlier order of injunction granted against the 1st defendant and later dissolved by consent. Constructions of roads drains and bridges are outside the scope of s. 49. The 2nd and 3rd defendants might have claimed that they were constructing the drains and the road on behalf of the 1st defendant. But, this cannot be true because under the agreement between the 1st defendant and the 2nd defendant dated 9 May 1991 and pursuant to s. 49 they only contracted to carry out the main sewerage construction. Further, it cannot be the function or duty of Majlis Perbandaran Pulau Pinang to construct roads, drains and bridges for housing developers. I make this observation based on the main term of this injunction order restraining the 1st defendant etc. from constructing

roads, drains and/or bridges on the said portion on which, premises No. 267A and 267H were situated. For the above reasons, the present injunction against the 1st defendant must be dissolved with costs. There will be an inquiry as to damages before the Registrar.

7. As for the application of the 2nd and 3rd defendants, it is my finding that the injunction against them must remain in force until the final disposal of the suit. In arriving at my decision, I apply the guidelines laid down by Lord Diplock in *American Cyanamid v. Ethicon Ltd.* [1975] 1 All ER 504. There is *prima facie* evidence that the 2nd and 3rd defendants, their servants or agents had trespassed on the plaintiff's portion by demolishing the remaining structures, pig-sties, fish tanks and outhouse for the purpose of constructing road, drains and bridge on the said portion. However, whether or not the trespass is legal and justified by law, bearing in mind the contention of the 2nd and 3rd defendants that the 2nd defendant is the registered lessee of the whole land from Khoo Kongsi and that its interest is free from any adverse claim and that as a result of the subdivision the said portion had been surrendered to the State Authorities to be used for roads and drains (the latter being a bare assertion) is an issue to be determined at the full trial. For the moment, I am satisfied the plaintiff has shown an arguable case against the defendants. On the question of the adequacy of damages, from the evidence I find damages would not adequately compensate the plaintiff for the temporary damage he and the family have suffered as a result of the trespass and the demolition of the two premises, the pig-sties and fish tanks which are his source of livelihood because of his possessory right to the said portion. I am equally satisfied that, were he to succeed at the trial in establishing his right to a permanent injunction, he would not be adequately compensated by an award of damages. It follows that when there is doubt as to the adequacy of damages, then the question of the balance of convenience comes into play. In this regard based on the plaintiff's affidavit, in particular the fact that he and the family had no place to stay and the demolition of the pig-sties and fish tanks had affected his livelihood, I find the balance of convenience tilts in favour of the plaintiff. The 2nd defendant had contended the present injunction affected the rights of several innocent purchasers of houses in the Perumahan Farlim project and the delay would expose the 2nd defendant to substantial claim for damages. The 2nd defendant would then suffer undue hardship. Hence, on the balance of convenience, the injunction should be dissolved. In my view, the 2nd defendant have only themselves to blame for being in this situation. They ought to have made proper inquiries or search at the Land Registry regarding the possession or true ownership of the said portion. Then, there ought to be proper notice to quit given to the plaintiff. They cannot move into someone's land and demolish the structures under the pretext that the land had been vested to the State Authority or that they were under a public duty to construct road and drains on the said portion.

For the above reasons, the 2nd and 3rd defendants' application is dismissed with costs. I make an order for an early trial of the suit.

Also found at [1992] 3 CLJ 1480